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No. _____

In The

Supreme Court of the United States

THE REPUBLIC OF GUATEMALA, THE REPUBLIC OF NICARAGUA, and UKRAINE,

Petitioners,

v.

THE TOBACCO INSTITUTE, INC., *ET AL.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether sovereign nations should be prevented from proceeding in U.S. courts with claims against the tobacco industry, on grounds that the losses they incurred in providing health care to citizens with tobacco-related illnesses are too "remote," given the facts that:

- The nations paid directly for health care costs and are unable to recoup funds they expended;
- the nations were treated like third-party health care payors that are able to recoup funds they expended;
- the court of appeals' opinion contradicts many decisions allowing government entities to proceed with similar claims against the tobacco industry;
- the nations have no redress in their own courts for some of their losses; and
- the nations' citizens have no redress in any court for the nations' losses.

PARTIES TO THE PROCEEDING

The appellants in the court of appeals (plaintiffs in the district court) were:

The Republic of Guatemala

The Republic of Nicaragua

Ukraine

The appellees in the court of appeals (defendants in the district court) were:

The American Tobacco Company, Successor in Interest to American Brands, Inc.

BATUS Holdings, Inc.

British American Tobacco, P.L.C., f/k/a B.A.T. Industries, P.L.C.

British American Tobacco (Investments) Limited, f/k/a British American Tobacco Co., Ltd.

Brooke Group, Ltd.

Brown & Williamson Tobacco Corporation

Brown & Williamson Tobacco Corporation, Successor by Merger to the American Tobacco Company

The Council for Tobacco Research-U.S.A., Inc., Successor to Tobacco Institute Research Committee

Liggett Group, Inc.

Philip Morris Companies, Inc.

Philip Morris Incorporated

PARTIES TO THE PROCEEDING – Continued

Philip Morris International, Inc.

Philip Morris Sales, Inc.

Liggett & Myers, Inc.

Loews Corporation

Lorillard Corporation

RJR Nabisco, Inc.

R. J. Reynolds Tobacco Company

The Tobacco Institute, Inc.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners the Republic of Guatemala, the Republic of Nicaragua, and Ukraine (the Nations) respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The opinion of the court of appeals is reported at 249 F.3d 1068 (D.C. Cir. 2001). It is reproduced at App. 1-18.

The opinion of the district court in *Guatemala* is reported at 83 F.Supp.2d 125 (D.D.C. 1999). It is reproduced at App. 19-41.

The opinion of the district court in *Nicaragua* and *Ukraine* is unreported. It is reproduced at App. 42-46.

JURISDICTION

The District of Columbia Circuit issued its opinion on May 22, 2001. The Nations did not file a petition for rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

The district court had subject matter jurisdiction under 28 U.S.C. §§ 1331, 1332, 1337, 1367; 15 U.S.C. §§ 15, 26; and 18 U.S.C. § 1964. The court of appeals had subject matter jurisdiction under 28 U.S.C. § 1291.

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 1961. Definitions

As used in this chapter –

(1) "racketeering activity" means . . . (B) any act which is indictable under any of the following provisions of title 18, United States Code: section 1341 (relating to mail fraud), section 1343 (relating to wire fraud) . . .

* * *

(3) "person" includes any individual or entity capable of holding a legal beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

* * *

18 U.S.C. § 1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity . . . directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or

operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

* * *

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity. . . .

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

* * *

18 U.S.C. § 1964. Civil remedies

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

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15 U.S.C. § 1. Trusts, etc., in restraint of trade illegal; penalty

Every contract . . . or conspiracy, in restraint of trade or commerce among the several States, or foreign nations, is hereby declared to be illegal.

* * *

15 U.S.C. § 15. Suits by persons injured

(a) Amount of recovery; prejudgment interest

. . . [A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent . . .

* * *

15 U.S.C. § 22. District in which to sue corporation

Any suit . . . under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found.

Political Constitution of the Republic of Guatemala, Title II, Ch. II, Sec. 7, Art. 94:

Obligation of the State on health and social assistance.

Through its institutions, it will carry out actions for the prevention, promotion, recovery, rehabilitation, coordination and pertinent related [matters] in order to obtain for them, the most complete physical, mental and social well-being.

Health Code Decree 90-97 of the Congress of the Republic of Guatemala, Book 1, Ch. I, Art. 4:

> The Ministry of Public Health and Social Assistance will guarantee the rendering of free services to those persons and their families, whose personal incomes do not permit them to bear the cost of part or all of the health services rendered.

Ukraine Constitution of June 26, 1996, Art. 49

> Every person has the right to health care protection, medical care, and medical insurance.
>
> Health protection is ensured by State funding of relevant socioeconomic, medical-sanitary, and healing-prophylactic programs.
>
> The State creates conditions for effective and widely-available medical care for every individual. Medical care is provided free-of-charge in state and communal institutions; the current network of such institutions shall not be limited. The State assists in the development of medical institutions of all forms of ownership.

* * *

STATEMENT

Petitioners are three Nations – Guatemala, Nicaragua, and Ukraine – constitutionally obligated to provide health care to their citizens. The Nations sued the tobacco industry (a group of tobacco companies and related industry organizations), seeking to recoup monies

expended in providing free health care for those of their citizens suffering from tobacco-related illnesses.

The Nations' citizens – smokers and non-smokers alike – are affected by the Nations' fiscal injuries resulting from the tobacco-related medical care they provided to their citizens. Those public monies, more properly used for other social programs, have been forced to be diverted to health care.

The tobacco industry's fraudulent conspiracy is known to have been masterminded in this country. The industry's concealment of the addictiveness of nicotine and the health hazards caused by smoking is common knowledge, as is its use of marketing techniques to make tobacco products attractive to children.

The tobacco industry's tortious conduct has been successful: millions of the Nations' citizens smoke, and consequently suffer from smoking-related disease. And each Nation must pay all health care costs for its citizens; those costs may not be passed on to other entities. No other entities or persons are able to seek recovery for the Nations' tobacco-related medical expenses, nor have any attempted to do so.

The Nations' lawsuits were brought originally in three separate federal district courts (two in D.C. and one in Puerto Rico). They were later consolidated for pretrial purposes before the U.S. District Court for the District of Columbia (Hon. Paul L. Friedman) (J.A. 313-17).[1]

---

[1] Other foreign government cases are presently pending before the D.C. district court, as well as in various state courts.

Guatemala filed the first action against the tobacco industry in May 1998. Shortly thereafter, the tobacco companies moved to dismiss its lawsuit for failure to state a claim. They asserted that Guatemala's injuries were derivative of injuries suffered by its smokers, and thus too "remote" or indirect to survive.

Nicaragua's suit against the tobacco industry followed in late 1998, and Ukraine's in late 1999. The three lawsuits advanced similar claims under RICO, 18 U.S.C. §§ 1964 *et seq.*, and the antitrust laws, 15 U.S.C. §§ 15 *et seq.* Additional claims were brought, including conspiracy, fraud, negligence, and products liability.

On December 30, 1999, the district court dismissed Guatemala's suit based on remoteness. App. 19-41. Only limited jurisdictional discovery was permitted before dismissal.

The court then ordered Nicaragua and the Ukraine to show cause why their cases should not also be dismissed. (J.A. 341-42). Without allowing any discovery, on March 31, 2000, the court dismissed those cases for the same reasons given in its earlier opinion. App. 42-46.

The D.C. Circuit affirmed on May 22, 2001, holding that the Nations' injuries were too remote to have been proximately caused by the alleged conduct of the tobacco companies. App. 1-18. The opinion also affirmed the dismissal on remoteness grounds of an action against the tobacco industry brought by a group of third-party health care payors (union trust funds). The D.C. Circuit's reasoning applied the same law to the Nations' claims as it

did to the trust funds' claims. The opinion did not mention any tobacco decisions in which government entities were plaintiffs.

REASONS FOR GRANTING REVIEW

I. THE D.C. CIRCUIT DEPRIVED THE NATIONS OF ANY REMEDY BY FINDING THEIR INJURIES TOO "REMOTE"

A. Introduction

The D.C. Circuit dismissed the Nations' actions based on remoteness, *i.e.*, the derivative nature of their damages. Despite the court's reason for dismissal, its subtext is evident from the following statement:

> [B]ecause [the Nations] have assumed the responsibility of compensating the directly injured, they suggest that if they cannot recover in this action for the alleged harms, no one can. Assuming the premise to be correct . . . the argument mistakenly assumes that it was Congress' intent that there must be recoveries, regardless of the burdens inflicted on the legal system and the significant policies captured in the first two *Holmes* factors. . . . It seems especially implausible that Congress would have wished to saddle the United States judicial system with such burdens simply to accommodate the legal idiosyncrasies of foreign nations. To the extent that such idiosyncrasies stand between the nations' smokers and recoveries in United States courts, the nations may wish to consider amendment to their domestic law.

App. 15.

Notwithstanding the D.C. Circuit's reluctance to countenance the Nations' use of the United States judicial system, foreign nations have been allowed to sue in this country for well over a century. Guatemala, Nicaragua and Ukraine were entitled to file suit in United States courts; and they did so because the tobacco industry's tortious activities originated here.

Further, at least in Guatemala, some of the causes of actions advanced and damages sought are not available in that Nation's courts. According to the affidavit of the tobacco companies' expert, a former Chief Justice of the Supreme Court of Guatemala, no statutory authorization exists for any of Guatemala's claims against the tobacco industry, nor is an award of punitive or treble damages permitted. (J.A. 416-18, 422, 424).[2]

Review should thus be granted to ensure that foreign nations, harmed by tortious conduct arising in the United States, are afforded an opportunity to seek redress in United States courts. If the court of appeals' decision is allowed to stand, the Nations, as parties foreseeably injured by the tobacco industry's tortious activities, will be deprived of a remedy.

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[2] No affidavits were submitted on behalf of Nicaragua and Ukraine. But the two Nations' legal systems are based on the civil code, as are Guatemala's. Therefore, the laws are likely to be similar.

B. The D.C. Circuit did not Apply Rule 12(b)(6) Standards to this Court's Proximate Cause Factors

The D.C. Circuit's opinion held that the Nations' injuries were too remote to be actionable. In so holding, the court did not apply Rule 12(b)(6) standards to the proximate cause factors set out in *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258 (1992), and *Associated Gen. Contractors of Cal., Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983). The *Holmes/AGC* factors consider (1) the difficulty in determining whether damages resulted from the defendants' conduct or from other factors; (2) the need for complicated rules to apportion damage among plaintiffs, or in other words, the risk of duplicative damages; and (3) the likelihood of more directly injured persons bringing future actions. *Holmes*, 503 U.S. at 269-70.

The appeals court noted that the *Holmes/AGC* factors are geared to finding "an appropriate plaintiff," or one with a "sufficiently direct causal relationship to the alleged wrongdoing." App. 9. The result of the D.C. Circuit's decision, however, was not that less appropriate plaintiffs were selected. Rather, the decision resulted in no plaintiffs being able to sue for the Nations' damages.

Whether a claim is remote involves a review of the facts of a specific case. *See AGC*, 459 U.S. at 536 n.33 ("courts should analyze each situation in light of the factors set forth in the text"); *Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris, Inc.*, 171 F.3d 912, 922 (3d Cir. 1999), *cert. denied*, 528 U.S. 1105 (2000).

The only facts before the district court when it dismissed the Nations' cases, and before the circuit court in affirming the dismissal, were those stated in the Nations' complaints and affidavits. (J.A. 45-128, 131-302, 416-88). Contrary to what the D.C. Circuit found, no record evidence indicated that damages were speculative or difficult to calculate. There was no showing of a risk of multiple recoveries or any need for apportioning damages between groups of plaintiffs. And there was no showing that individual smokers either had sued or could sue the tobacco industry.

All Nations pleaded that they had themselves paid the medical expenses for their citizens. The D.C. Circuit merely assumed that there would be a multiplicity of smoker suits requiring complicated rules for apportioning damages, and that the Nations' individual smokers could "vindicate the public interests at stake." App. 12.

This Court requires that allegations of a complaint be accepted as true. *See, e.g., Lujan v. Defenders of Wildlife,* 504 U.S. 555, 561 (1992); *Warth v. Seldin,* 422 U.S. 490, 501 (1975) (citing *Jenkins v. McKeithen,* 395 U.S. 411, 421-22 (1969)). The appellate court should not have disregarded those standards when analyzing the *Holmes/AGC* factors.[3]

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[3] Additionally, no discovery was allowed to take place before the Nations' lawsuits were dismissed. Given the lack of discovery, the Nations' claims should not have been dismissed based on uncertainty of proof.

C. The Nations' Tobacco-Related Damages Can be Calculated

In discussing the first *Holmes/AGC* factor, the D.C. Circuit noted that other appellate courts had found union fund damages "highly speculative and difficult to calculate given the many other potential causes for the alleged financial injuries." App. 11. The court followed those holdings to the letter, concluding that the Nations "have [not] shown that their claimed economic harms were not caused by other independent factors. . . . " App. 13.

The test for speculativeness, however, does not concern whether the Nations' claims for damages are difficult to prove in the abstract. Rather, the test is whether indirectness makes it "**more** difficult" to ascertain the amount of damages than if a more directly injured party had sued. *See Holmes*, 503 U.S. at 269 (emphasis added). But the concern about relative difficulty of proof presupposes that a more direct party with more ascertainable damages could have brought the same claim. That is not the case here.

Further, only the fact of damages must not be speculative under *Holmes*. No speculation about damages is present in the Nations' case.[4] A more relaxed standard is applied in proving the extent of damages. *See, e.g., J. Truett Payne Co., Inc. v. Chrysler Motors Corp.*, 451 U.S. 557, 566 (1981); *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 114 n.9 (1969).

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[4] The fact of damages is not speculative; the correlation between smoking and disease is common knowledge.

The extent of tobacco-related disease and death in any population may be determined on aggregated statistical proof, such as epidemiological studies and surveys. Indeed, the Nations' ability to proceed on aggregated statistical proof, rather than individualized proof, **decreases** causal complications. *See, e.g., Texaco v. Hasbrouck*, 496 U.S. 543, 572-73 n.31 (1990) (approving use of statistical evidence). The D.C. Circuit disregarded *Hasbrouck*, however, concluding that "[r]eliance on aggregate statistical proof . . . compounds the difficulties and does not alter the speculative nature of the claimed damages." App. 14. Although the Nations would have been able to prove their own smoking-related health care costs through statistics, including governmental records, the lower courts did not allow them to do so before dismissing their claims.

D. No Other Plaintiffs Exist to Cause Apportionment Difficulties

The second *Holmes/AGC* factor addresses the risk of duplication of damages. In effect, it asks whether a court would be forced to face a damages apportionment issue because of potentially multiple plaintiffs seeking compensation for the same injury.

Again, the D.C. Circuit followed union fund authority, holding that "the [N]ations have [not] shown that difficult problems of duplicative recoveries or allocation of damages could be avoided. . . . " App. 13. It continued by concluding that if the Nations were allowed to proceed, "other indirectly injured parties might also sue." App. 14.

But there are no other indirectly injured parties here. The D.C. Circuit ignored the fact that the Nations advanced claims for RICO and antitrust violations. Economic harm to the Nations caused by the tobacco industry's tortious conduct is not the same as the smoking-related personal injuries suffered by residents of each Nation. 18 U.S.C. § 1964(c) (RICO) and § 4 of the Clayton Act, 15 U.S.C. § 15 (antitrust), both authorize a plaintiff to sue for injury to its "business or property." By contrast, individuals who have suffered personal injuries are prohibited from seeking redress under RICO or antitrust.[5] Rather, the statutory requirement restricts injury to a proprietary or economic type of damage. *See, e.g., Sedima, SPRL v. Imrex Co.*, 473 U.S. 479, 509 (1985); *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979). Certainly, financial loss suffered by a government is a form of injury to business or property. *See id.* at 338. In short, the Nations' citizens are in no position to vindicate the RICO and antitrust claims brought by their governments.

Guatemala, Nicaragua and Ukraine are the only parties able to bring suit on behalf of their own treasuries. No other person or entity in any of the three Nations stands in the legal position to recover for the depletion of national public funds. Individual private citizens do not

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[5] Even the appellate courts that had dismissed union fund cases recognized that fact. *See, e.g., Laborers Local 17 Health & Benefit Fund v. Philip Morris, Inc.*, 191 F.3d 229, 241 (2d Cir. 1999), *cert. denied*, 528 U.S. 1080 (2000); *Oregon Laborers-Employers Health & Welfare Trust Fund v. Philip Morris, Inc.*, 185 F.3d 957, 964 (9th Cir. 1999), *cert. denied*, 528 U.S. 1075 (2000); *Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris, Inc.*, 171 F.3d 912, 933 (3d Cir. 1999), *cert. denied*, 528 U.S. 1105 (2000).

have standing to sue to recover for expenditures from the public fisc.

Finally, the possibility that private individuals may have been personally injured does not preclude RICO and antitrust suits. The D.C. Circuit ignored this Court's authority holding that a plaintiff may sue even when his injury derives from the effects of a defendant's misconduct on intervening third parties. *See AGC*, 459 U.S. at 541-42 (unionized subcontractors, the secondary victims of the defendants' coercion, had antitrust standing even though their injury was indirect); *Blue Shield of Va. v. McCready*, 457 U.S. 465 (1982) (plan participant had antitrust standing to bring suit against an alleged conspiracy between Blue Cross and participating psychiatrists, aimed not at the participant but at psychologists); *National Org. for Women, Inc. v. Scheidler*, 510 U.S. 249 (1994) (business had standing to sue for injuries to its property due to racketeering-inflicted personal injuries to its workers).

The circuit court's decision frustrates the purpose behind RICO and the antitrust laws. Both statutes were intended to overcome limitations in state law by affording a remedy to those whose business and property is injured by wrongdoing. *See, e.g., Sedima*, 473 U.S. at 498 ("RICO was an aggressive initiative to supplement old remedies and develop new methods for fighting crime.")

The three Nations are the only possible RICO and antitrust plaintiffs to seek redress for their losses because no other plaintiff is entitled to sue under either statute for the Nations' economic injuries. This Court has never approved a remoteness or proximate cause inquiry that

precluded all possible RICO or antitrust plaintiffs from suing for a given economic loss.

E. No More Directly Injured Parties Can Vindicate the Public Interest

The third *Holmes/AGC* factor is related to the second, in that it seeks plaintiffs in a better position to sue, or to "vindicate the law as private attorneys general. . . . " *See Holmes*, 503 U.S. at 269-70. Again, the D.C. Circuit confused smokers' personal injuries with the Nations' economic injuries: "[I]ndividual smokers may be counted on to vindicate the public interests at stake . . . by asserting various theories of recovery against the tobacco industry." App. 12. Those smokers can neither sue nor recover for the Nations' injuries.

The only parties to have paid the expenses here are the Nations. Individuals injured by tobacco have not been shown to have a personal cause of action, either in their own courts or in the U.S., which would allow them to recover health care costs the Nations spent on their behalf.

II. THE D.C. CIRCUIT IMPROPERLY TREATED THE NATIONS LIKE THIRD-PARTY HEALTH CARE PAYORS

Third-party payors for health care, such as union trust funds, pass on their expenditures to employers or beneficiaries. Indeed, the D.C. Circuit noted as much: "[T]he insurers have likely already passed the costs on to the directly injured through higher premiums." App. 14.

Unlike the cases the D.C. Circuit relied on, however, the Nations cannot pass on their expenses to employers or set their premiums to take into account smokers' health problems. *See International Bhd. of Teamsters Local 134 Health & Welfare Trust Fund v. Philip Morris, Inc.*, 196 F.3d 824; *Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris, Inc.*, 171 F.3d at 921 n.4. Each Nation has a constitutional obligation to provide free health care to its citizens. And the costs of that care cannot be offset through the collection of higher premiums from smokers, or from employers on their behalf. *See Teamsters*, 196 F.3d at 823-24, authority relied upon by the D.C. Circuit. App. 14.

In *Pfizer, Inc. v. Government of India*, 434 U.S. 308 (1978), this Court held that a foreign nation was a "person" under the antitrust laws, and thus was permitted to sue for treble damages. The Court's conclusion was based on its reasoning in an earlier decision, *Georgia v. Evans*, 316 U.S. 159 (1942), in which the Court held that the State of Georgia was entitled to sue for antitrust treble damages.

The *Pfizer* Court analogized the rights of a foreign nation to those of a state, based on the rationale underlying *Georgia v. Evans*:

> [T]he reasoning of [*Georgia v. Evans*] leads to the conclusion that a foreign nation, like a domestic state, is entitled to pursue the remedy of treble damages when it has been injured in its business or property by antitrust violations.

See Pfizer, 434 U.S. at 318.

But the D.C. Circuit did not analogize the Nations' lawsuits against the tobacco industry to dozens brought by other governmental entities, *i.e.*, the states. Instead, the court superimposed trust fund and insurance authority on the Nations' claims, treating them as if they had been advanced by third-party health care payors.

The court of appeals should not have ignored relevant law. In cases similar to the Nations' lawsuits against the tobacco industry, twenty-three of twenty-four courts allowed some or all of the states' claims to survive, despite the industry's motions to dismiss their actions.[6]

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[6] *See Alaska v. Philip Morris*, No. 1JU-97-915Cl (1st Jud. Dist. Oct. 9, 1998); *Arizona v. American Tobacco Co.*, No. CV-SC-14769 (Ariz. Sup. Ct. May 27, 1997); *Colorado v. R. J. Reynolds Tobacco Co.*, 1997 CV-003432 (Colo. Dist. Ct. Oct. 2, 1998); *Florida v. American Tobacco Co.*, CL 95-1466 AH, 1996 WL 788371 (Fla. Cir. Ct. Dec. 13, 1996), *cert. denied*, 697 So.2d 1249 (Fla. 4th DCA 1997); *Hawaii v. Brown & Williamson Tobacco Co.*, No. 97-0441-01 (Haw. Cir. Ct. Sept. 18, 1998); *Idaho v. Philip Morris*, No. CV-OC-97-03239 *D (Ida. Dist. Ct. Sept. 2, 1998); *Illinois v. Philip Morris*, No. 96L 13146 (Ill. Cir. Ct. Nov. 13, 1997); *Iowa v. R. J. Reynolds Tobacco Co.*, No. CL 71048 (Iowa Dist. Ct. Aug. 26, 1997); *Maryland v. Philip Morris*, 1997 WL 540913 (Md. Cir. Ct. 1997); *Massachusetts v. Philip Morris*, No. 95-7378-J (Mass. Super. Ct. Oct. 22, 1997); *Michigan v. Philip Morris*, No. 96-84281-CZ (Mich. Cir. Ct. May 28, 1997); *Minnesota v. Philip Morris*, 551 N.W.2d 490 (Minn. 1996); *Mississippi v. American Tobacco Co.*, No. 94-1429 (Miss. Chan. Ct. Feb. 21, 1995); *Montana v. Philip Morris*, No. CDV-97-306 (Mont. Dist. Ct. Sept. 23, 1998); *Nevada v. Philip Morris*, No. CV97-03279 (Nev. Dist. Ct. May 8, 1998); *New Jersey v. R. J. Reynolds Tobacco Co.*, No. C-254-96 (N.J. Super. Ct. Sept. 18, 1998); *Ohio v. Philip Morris*, No. 97CVH05-5114 (Ohio Ct. of Common Pleas Aug. 28, 1998); *Texas v. American Tobacco Co.*, 14 F.Supp.2d 956 (E.D. Tex. 1997); *Vermont v. Philip Morris*, No. S 744-97 CnC (Vt. Super. Ct. Mar. 25, 1998); *Washington v.*

III. THE NATIONS ARE ENTITLED TO BRING *PARENS PATRIAE* ACTIONS

Guatemala, Nicaragua and Ukraine are governments charged with maintaining the general health and welfare of their populations. To that end, each Nation sued the tobacco industry in *parens patriae*, to protect its quasi-sovereign interests. *See Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 602 (1982) (quasi-sovereign interests "consist of a set of interests that the State has in the well-being of its populace"). The complaints alleged the Nations' *parens patriae* interests. (J.A. 8, 99-101; 21, 138-39; 37, 294-98).

This Court has long allowed foreign nations to sue in United States courts for injuries to their business or property. *See, e.g., Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964); *The Sapphire*, 78 U.S. (11 Wall.) 164 (1870). Further, foreign governments have also been granted the right to sue under RICO and antitrust. *See Pfizer, Inc. v. Government of India*, 434 U.S. 308 (1978) (antitrust); *Philippines v. Marcos*, 862 F.2d 1355 (9th Cir. 1988), *cert. denied*, 490 U.S. 1035 (1989) (RICO); *Attorney General of Canada v. R. J. Reynolds Tobacco Holdings, Inc.*, 103 F.Supp.2d 134 (N.D.N.Y. 2000) (RICO).

American Tobacco Co., 1996 WL 931316 (Wash. Super. Ct. Nov. 19, 1996); *West Virginia v. American Tobacco Co.*, No. 94-C1707 (W. Va. Cir. Ct. May 3, 1995); *Wisconsin v. Philip Morris*, No. 97-CV-328 (Wis. Cir. Ct. Mar. 17, 1998); *Rossello v. Brown & Williamson Tobacco Corp.*, No. 97-1910 (JAF) (D.P.R. Aug. 10, 1998). Only Indiana's case was dismissed in its entirety, in a two-page order lacking analysis or discussion. *See Indiana v. Philip Morris*, No. 49D07-9702-CT-000236 (Ind. Super. Ct. July 23, 1998).

The Nations properly sued in *parens patriae*. *See Coordination Council for N. Am. Affairs v. Northwest Airlines, Inc.*, 891 F.Supp. 4, 7 n.3 (D.D.C. 1995) ("Foreign sovereigns are equally entitled to protect their citizens and may claim *parens patriae* standing to the same extent as a state."); *see also United States v. Cohen*, 733 F.2d 128, 152 n.21 (D.C. Cir. 1984); *Pennsylvania v. Kleppe*, 533 F.2d 668, 671 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 977 (1976); *Kickapoo Tribe of Okla. v. Lujan*, 728 F.Supp. 791, 795 (D.D.C. 1990).

Relying on *Estados Unidos Mexicanos v. DeCoster*, 229 F.3d 332 (1st Cir. 2000), the D.C. Circuit characterized as "dubious" the Nations' assertion that they could proceed in *parens patriae*. App. 10. The case does not apply since Mexico could assert no real separate sovereign interest in *DeCoster*; it was merely asserting the private interests of fourteen of its citizens. Here, the Nations asserted their own sovereign interests – not simply an interest in a small subset of their citizens.

In short, the Nations are entitled to sue in *parens patriae*. They have alleged injuries to their governmental treasuries distinct and separate from the interest of any individual smoker or private individual. Generalized financial effects in the form of fiscal injury are borne by the entire population of each Nation, whether smoker or non-smoker. Each Nation suffers when public monies are diverted from other social programs to care for the victims of the tobacco industry's tortious conduct.

CONCLUSION

This Court should grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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United States Court of Appeals,
District of Columbia Circuit.

SERVICE EMPLOYEES INTERNATIONAL UNION HEALTH AND WELFARE FUND, et al., Appellees,

v.

PHILIP MORRIS INCORPORATED, et al., Appellants.

The Republic of Guatemala, Appellant,

v.

The Tobacco Institute, Incorporated, et al., Appellees.

Nos. 00-7023, 00-7093 to 00-7100, 00-7118 and 00-7120.

Argued Feb. 21, 2001.
Decided May 22, 2001.

Appeals from the United States District Court for the District of Columbia (No. 98cv00704) (No. 98cv01185) (No. 99cv01535) (No. 98cv01569) (No. 98cv01716) (No. 99cv02326) (No. 99cv03080) (No. 99ms00213).

Herbert M. Wachtell argued the cause in No. 00-7093 for appellants. With him on the briefs were Peter C. Hein, David S. Eggert, Timothy M. Broas, Michael K. Atkinson, Robert F. McDermott, Jr., Paul S. Ryerson, Robert H. Klonoff, Paul Reichert, Kenneth N. Bass, Leigh Hyer, Janet L. Goetz, Joseph Barloon, Keith A. Teel, D. Edward Wilson, Michael B. MacWilliams, Peter A. Woolson, Judah Best and John Parker Sweeney. Newman T. Halvorson, Jr. entered an appearance.

Michael C. Spencer argued the cause in No. 00-7093 for appellees. With him on the brief were Daniel Edelman and Roger M. Adelman.

Arthur R. Miller argued the cause in No. 00-7023 for appellants. On the briefs for appellants and amicus curiae Guatemalan National League Against Cancer were George M. Fleming, Sylvia Davidow, Andres C. Pereira, Richard M. Martin, Jr., Nicholas Gilman, and Jonathan S. Massey.

Herbert M. Wachtell argued the cause in No. 00-7023 for appellees. With him on the brief were Peter C. Hein, Timothy M. Broas, Michael K. Atkinson, Robert F. McDermott, Jr., Paul S. Ryerson, Kenneth N. Bass, Leigh Hyer, Garyowen P. Morrisroe, Thomas J. McCormack, Timothy M. Hughes, Robert E. Scott, Jr., Joseph M. McLaughlin, Gene E. Voigts, Richard L. Gray, John Vanderstar and Judah Best. Keith A. Teel, David Gruenstein, Daryl L. Joseffer, Michael A. Schlanger, Peter A. Woolson, and D. Edward Wilson, Jr. entered appearances.

Robin S. Conrad and Kenneth S. Geller were on the brief in No. 00-7023 of amicus curiae The Chamber of Commerce of the United States.

Before: WILLIAMS, SENTELLE and ROGERS, Circuit Judges.

Opinion for the Court filed by Circuit Judge ROGERS.

ROGERS, Circuit Judge:

In these two appeals, the court must determine whether the plaintiffs have demonstrated proximate cause in seeking, on an aggregate basis, to recover costs incurred as a result of paying for the health care needs of individual smokers. The complaints allege conspiracy

and fraud in connection with federal antitrust and racketeering ("RICO") claims as well as antitrust claims under District of Columbia law and common law claims. Similar claims have been considered and rejected as too remote by seven other circuits. Because we agree with the other circuits that the alleged injuries of the third-party payors are too remote to have been proximately caused by the defendants' alleged conduct, we reverse the denial of the motion to dismiss with respect to the RICO and fraud claims in *Service Employees International Union Health and Welfare Fund v. Philip Morris Inc.*, 83 F.Supp.2d 70 (D.D.C.1999) ("*Service Employees*"), and otherwise affirm the dismissal of the complaints in *Republic of Guatemala v. Tobacco Institute, Inc.*, 83 F.Supp.2d 125 (D.D.C.1999) ("*Guatemala*").

I.

A.

In *Service Employees*, several labor-management health trust funds ("the funds"), *see* 29 U.S.C. § 186(c)(5) (1994), sued Philip Morris, other tobacco companies, and other entities related to the tobacco industry, alleging a fraudulent scheme to preserve their control of the cigarette market and to avoid the costs of treating smoking-related diseases by counteracting smokers' efforts to quit, by impairing the ability of health care providers to reduce costs through effective smoking cessation programs and safer cigarettes, and by concealing the tobacco industry's active role in manipulating and perpetuating the resulting health care crisis. The funds seek to recover their payments for participants' smoking-related health care

costs by "su[ing] in their own capacities, rather than asserting claims in subrogation on behalf of individual [f]und beneficiaries."

The district court granted the defendants' motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) the funds' local and federal antitrust claims for lack of an antitrust injury and for failure to specify antitrust damages. *Service Employees,* 83 F.Supp.2d at 89-91. The court dismissed the funds' fraud claims without prejudice for failure to plead fraud with particularity as required by Federal Rule of Civil Procedure 9(b). *Id.* at 91-92. The district court also dismissed the funds' special duty, indemnity, and unjust enrichment claims. *Id.* at 92-94. Denying the motion to dismiss with respect to the funds' RICO claims, however, the district court accepted the funds' characterization of their injuries as "direct injuries to the trust assets," *id.* at 86, or harm "to their infrastructure and financial health and stability," *id.*, and rejected the view that such damages are entirely derivative of the harm suffered by the funds' beneficiaries, *id.* at 89. While the district court acknowledged the analytical framework provided by the Supreme Court in *Associated General Contractors of California, Inc. v. California State Council of Carpenters,* 459 U.S. 519, 103 S.Ct. 897, 74 L.Ed.2d 723 (1983) ("*AGC*"), and *Holmes v. Securities Investor Protection Corporation,* 503 U.S. 258, 112 S.Ct. 1311, 117 L.Ed.2d 532 (1992), it addressed proximate cause in terms of foreseeability and direct consequences, guided by the two-part test set forth in the *Restatement (Second) of Torts* § 431 (1965). *Service Employees,* 83 F.Supp.2d at 80-83. The district court concluded that foreseeable harm to the funds stemming from defendants' alleged conduct was "obvious," *id.* at

84, and resolved difficulties otherwise posed by the nature of the funds' claims by invoking "the inherent ability and flexibility of our common-law based legal system to respond to the demands of a case as difficult as this," *id.* at 79-80.

The defendants, in seeking reversal on the RICO and fraud claims, rely principally on what they characterize as "150 years of controlling precedent" regarding proximate cause under the common law that the Supreme Court's decisions in *AGC* and *Holmes* have incorporated in analyzing standing to pursue federal antitrust and RICO claims. *Holmes*, 503 U.S. at 267-70, 112 S.Ct. 1311; *AGC*, 459 U.S. at 529-35, 103 S.Ct. 897. In addition to relying on the rule that one who pays the medical expenses of another may not recover in a direct suit against the tortfeasor but must proceed by way of subrogation, *cf. Indus. Risk Insurers v. Creole Prod. Servs., Inc.*, 746 F.2d 526, 528 (9th Cir.1984); *Rock Island Bank v. Aetna Cas. & Sur. Co.*, 692 F.2d 1100, 1106-07 (7th Cir.1982); *Great Am. Ins. Co. v. United States*, 575 F.2d 1031, 1033-34 (2d Cir.1978), the defendants rely on the decisions of the circuit courts of appeal that have rejected such third-party payor suits against the tobacco industry. The funds, in turn, appeal the dismissal of all of their other claims save for their special duty and indemnity claims.

B.

The Republics of Guatemala, Nicaragua, and Ukraine ("the nations") seek to distinguish their claims from those of the typical third-party payor whose fate is sealed by

the decisions of other circuits. They contend that as sovereign nations constitutionally (or otherwise legally) obligated to provide free health care and other forms of social welfare to their residents, or at least to those who cannot afford to pay for such benefits, they have suffered economic harms to their treasuries that are independent of any harms allegedly suffered by their residents as a result of smoking defendants' products. The nations maintain that they are not only the best but the only plaintiffs who can recover for the economic harm allegedly suffered by their public fiscs. Further, they claim a purported right to sue in *parens patriae* that they view as overcoming concerns about their standing to recover their economic losses under RICO and the federal antitrust laws.

The district court dismissed the complaints in their entirety. *Guatemala,* 83 F.Supp.2d at 128.[1] Without adopting the defendants' position that the nations are merely complaining of a purely derivative harm, and acknowledging that the doctrine of remoteness affords courts flexibility in determining whether the alleged injury is remote from the alleged misconduct, the district court considered it "abundantly clear that the injury that [the nations] purportedly suffered occurred only as a consequence of the harm to individual smokers." *Id.* at 129. The district court concluded that the "tortured path" from the defendants' alleged wrongdoing to the nations' increased expenditures "demonstrates that [the nations'] claims are precisely the type of indirect claims that the proximate

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[1] By unpublished order, the district court dismissed the complaints of Nicaragua and the Ukraine for the reasons in *Guatemala.*

cause requirement is intended to weed out." *Id.* at 130 (quoting *Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris Inc.*, 171 F.3d 912, 930 (3d Cir.1999) ("*Steamfitters*")).

In seeking reversal, the nations contend that the district court misapplied the *Holmes* factors, ignored the foreseeable nature of the harms alleged as well as public policy considerations in conducting its proximate cause analysis, failed to address the alternate chain of causation alleged by the nations, and failed to acknowledge the nations' unique status as foreign sovereigns. Essentially, the nations urge this court to adopt the district court's proximate cause analysis in *Service Employees* and to give special weight to their right to sue as *parens patriae*. They also contend that the district court erred in not allowing them to replead their fraud and RICO claims. *See Guatemala*, 83 F.Supp.2d at 135 n. 8.

II.

Our review of the district courts' partial denial and grant of the defendants' motions to dismiss the complaints under Federal Rule of Civil Procedure 12(b)(6) is *de novo*. *See Kowal v. MCI Communications Corp.*, 16 F.3d 1271, 1276 (D.C.Cir.1994). Because the relevant legal analysis appears in several comprehensive decisions of other circuit courts of appeal, our analysis is brief.

To date, seven circuit courts of appeal have rejected claims similar to those brought by the funds and the nations by generally concluding that the alleged injuries are too remote and, therefore, are not redressable for lack

of proximate cause.[2] In *Service Employees*, the funds seek to distinguish these cases principally on the ground that the circuits have engaged in an overly mechanical analysis of proximate cause and ignored congressional intent and important public policies underlying RICO. Pointing to RICO's history and purpose, *see Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 519-20, 105 S.Ct. 3275, 87 L.Ed.2d 346 (1985) (Marshall, J., dissenting), the funds maintain that Congress intended to afford a remedy where, as here, in the funds' words, "people, with common law claims, . . . were not able to adequately oppose an industry of companies conspiring together to commit misconduct more akin to the racketeering of organized crime than to garden-variety product liability torts and isolated instances of fraud or deceit." Health care payors, by contrast, "were the type of business entities that suffered . . . economic injuries, and that had the size and power to mount credible attacks as private attorneys general to assist governmental law enforcement efforts."

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[2] *Lyons v. Philip Morris Inc.*, 225 F.3d 909 (8th Cir.2000); *United Food and Commercial Workers Unions, Employers Health and Welfare Fund v. Philip Morris Inc.*, 223 F.3d 1271 (11th Cir.2000); *Tex. Carpenters Health Benefit Fund v. Philip Morris Inc.*, 199 F.3d 788 (5th Cir.2000); *Int'l Bhd. of Teamsters, Local 734 Health and Welfare Trust Fund v. Philip Morris Inc.*, 196 F.3d 818 (7th Cir.1999) ("*Teamsters*"); *Laborers Local 17 Health and Benefit Fund v. Philip Morris Inc.*, 191 F.3d 229 (2d Cir.1999) ("*Laborers Local*"); *Oregon Laborers-Employers Health & Welfare Trust Fund v. Philip Morris Inc.*, 185 F.3d 957 (9th Cir.1999) ("*Oregon Laborers*"); *Steamfitters, Local Union No. 420 Welfare Fund v. Philip Morris, Inc.*, 171 F.3d 912 (3d Cir.1999) ("*Steamfitters*"); *see also Ass'n of Wash. Public Hosp. Dists. v. Philip Morris Inc.*, 241 F.3d 696 (9th Cir.2001) ("*Wash. Pub. Hosp.*"); *Allegheny Gen. Hosp. v. Philip Morris Inc.*, 228 F.3d 429 (3d Cir.2000) ("*Allegheny*").

Therefore, *Holmes, AGC, Illinois Brick Co. v. Illinois,* 431 U.S. 720, 97 S.Ct. 2061, 52 L.Ed.2d 707 (1977), and similar cases are distinguishable and properly understood as the Supreme Court's effort to choose among multiple possible plaintiffs that have suffered economic injury and to select only the most efficient and directly injured plaintiff. Furthermore, the funds contend that a proper analysis of the *Holmes* factors demonstrates that they have standing to pursue their RICO claims against the tobacco industry. In a somewhat similar vein, the nations contend that the district court's conclusion in *Guatemala* failed to recognize the unique status of the nations as foreign sovereigns seeking to protect their governments' treasuries through *parens patriae* actions.

The funds and the nations err in assuming that the proximate cause analysis called for by *AGC* and *Holmes* is a quest for the "best" (or, realistically, "least bad") plaintiff. Rather, the Supreme Court has insisted on an appropriate plaintiff, namely, a plaintiff whose alleged injury possesses a sufficiently direct causal relationship to the alleged wrongdoing. *See AGC,* 459 U.S. at 533-35, 103 S.Ct. 897; *see also Holmes,* 503 U.S. at 268-70, 112 S.Ct. 1311. The problem for the plaintiffs arises from long-standing common law principles which the Supreme Court has incorporated into the proximate cause requirement for purposes of determining standing to bring RICO and federal antitrust claims.

By relying on the analysis of RICO's legislative history set forth in Justice Marshall's dissenting opinion in *Sedima,* 473 U.S. at 512-13, 105 S.Ct. 3275, an approach rejected by the Court's majority, *id.* at 497 n. 15, 105 S.Ct.

3275, the funds seek to show that in enacting RICO Congress intended to adopt an analysis of the proximate causation requirement different from that identified by the Supreme Court in *Holmes*, 503 U.S. at 267-70, 112 S.Ct. 1311. There may be some tension between the *Holmes* (RICO) factors, which might be read simply to assert a single-factor direct-injury test that is merely supported by several policy factors, *see Holmes*, 503 U.S. at 269, 112 S.Ct. 1311, and the *AGC* (antitrust) approach, which balances the directness concerns along with other factors. *See AGC*, 459 U.S. at 537-45, 103 S.Ct. 897. This is not a pressing issue here, however, because it is not outcome determinative inasmuch as the funds and the nations lose under a pure directness test and under a balancing of the *Holmes* factors.

The nations' assertion that they may proceed in *parens patriae* is a dubious assertion at best, for as the First Circuit pointed out in *Estados Unidos Mexicanos v. DeCoster*, 229 F.3d 332, 336 (1st Cir.2000), *parens patriae* standing should not be recognized in a foreign nation (by contrast with a State in this country) unless there is a clear indication by the Supreme Court or one of the two coordinate branches of government to grant such standing. The nations offer no evidence of such intent. In any event, they fail to show that such status eliminates or adequately substitutes for proximate cause. Rather, the doctrine of *parens patriae* is merely a species of prudential standing, *see Md. People's Counsel v. FERC*, 760 F.2d 318, 321-22 (D.C.Cir.1985), and does not create a boundless opportunity for governments to seek recovery for alleged wrongs against them or their residents. *See, e.g., Pfizer, Inc. v. Lord*, 522 F.2d 612, 616 (8th Cir.1975).

Even were the court to view as oversimplified the defendants' reliance on the settled rule barring direct suits by third parties seeking to recover the costs of medical care paid on behalf of individuals injured as a result of an alleged tortfeasor's conduct,[3] application of the *Holmes* factors,[4] 503 U.S. at 269-70, 112 S.Ct. 1311, reveals that both the funds and the nations fail to demonstrate proximate cause. With respect to the first *Holmes* factor, the circuits have generally concluded that damages for such claims are highly speculative and difficult to calculate given the many other potential causes for the alleged financial injuries. *See Wash. Pub. Hosp.*, 241 F.3d at 703; *Allegheny*, 228 F.3d at 441-42;[5] *Laborers Local*, 191 F.3d

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[3] *Cf. Indus. Risk Insurers*, 746 F.2d at 528; *Rock Island Bank*, 692 F.2d at 1106-07; *Great Am. Ins. Co.*, 575 F.2d at 1033-34.

[4] In explaining that the common law required "some direct relation between the injury asserted and the injurious conduct alleged," *Holmes*, 503 U.S. at 268, 112 S.Ct. 1311, the Supreme Court characterized its decision in *AGC* as identifying three relevant considerations: (1) the need for sufficiently direct factual causation in order to be able "to ascertain the amount of a plaintiff's damages attributable to the violation, as distinct from other, independent, factors"; (2) the avoidance of "complicated rules apportioning damages among plaintiffs removed at different levels of injury from the violative acts [so as] to obviate the risk of multiple recoveries"; and (3) the assurance that "directly injured victims can generally be counted on to vindicate the law as private attorneys general, without any of the problems attendant upon suits by plaintiffs injured more remotely." *Id.* at 269-70, 112 S.Ct. 1311 ("the *Holmes* factors").

[5] The decisions of the Third and Ninth Circuits in *Allegheny* and *Washington Public Hospital* are instructive with respect to the nations' claims because, like the nations, the plaintiffs in both cases were legally obligated to directly provide health care

at 239-40; *Oregon Laborers*, 185 F.3d at 964-65; *Steamfitters*, 171 F.3d at 928-29; *cf. Teamsters*, 196 F.3d at 823-24. Regarding the second *Holmes* factor, the circuits have concluded that allowing such claims to proceed would create a risk of multiple recoveries and necessitate complicated rules for apportioning damages between groups of plaintiffs removed at various levels from the tobacco industry's alleged wrongdoing. *See Wash. Pub. Hosp.*, 241 F.3d at 703; *Teamsters*, 196 F.3d at 823; *Laborers Local*, 191 F.3d at 240-41; *Oregon Laborers*, 185 F.3d at 965-66; *cf. Allegheny*, 228 F.3d at 442; *Steamfitters*, 171 F.3d at 933. The third *Holmes* factor, the circuits have generally concluded, cannot outweigh important policies underlying the first two *Holmes* factors, *see Steamfitters*, 171 F.3d at 933-34; *see also Oregon Laborers*, 185 F.3d at 964, and furthermore, individual smokers may be counted on to vindicate the public interests at stake in the third factor by asserting various theories of recovery against the tobacco industry. *See Wash. Pub. Hosp.*, 241 F.3d at 703; *Teamsters*, 196 F.3d at 823; *Laborers Local*, 191 F.3d at 241; *Oregon Laborers*, 185 F.3d at 964. In addition, the circuits have rejected the contention that specific intent is sufficient to demonstrate proximate cause, *see Allegheny*, 228 F.3d at 439; *Laborers Local*, 191 F.3d at 241-42; *Steamfitters*, 171 F.3d at 925, or that the foreseeable nature of the harms alleged is sufficient to satisfy the proximate cause requirement. *See Steamfitters*, 171 F.3d at 926. Furthermore, the Ninth and Third Circuits have rejected efforts to distinguish between third-party health care payors like the funds and

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to smokers who could not afford to pay for such services. *See Wash. Pub. Hosp.*, 241 F.3d at 700; *Allegheny*, 228 F.3d at 436, 443.

direct health care providers like the nations with respect to the derivative nature of the harms alleged. *See Wash. Pub. Hosp.*, 241 F.3d at 702-03; *Allegheny*, 228 F.3d at 440-41.

We likewise hold that the harms alleged by the funds and the nations are too remote from the defendants' alleged wrongdoing to provide antitrust or RICO standing. Neither the funds nor the nations have shown that their claimed economic harms were not caused by other independent factors or that difficult problems of duplicative recoveries or allocation of damages could be avoided were they allowed to proceed. Indeed, as the defendants suggest, the alleged harm arising from payment of medical expenses by the funds and the nations is itself derivative of alleged injuries to individual smokers, and the alleged "infrastructure" harms are even more remote than the damages for medical payments because the potential for "infrastructure" harm does not exist until an actuarially significant number of medical payments on behalf of smokers has been made. *See Laborers Local*, 191 F.3d at 239; *Oregon Laborers*, 185 F.3d at 963; *Steamfitters*, 171 F.3d at 927-28; *cf. Teamsters*, 196 F.3d at 823-24. Moreover, as the Seventh Circuit tellingly observed in *Teamsters*, insurers are hard pressed to demonstrate financial harm flowing from the tobacco industry's alleged wrongdoing because they possess information that would have indicated a need to collect higher premiums from smokers. *See Teamsters*, 196 F.3d at 823-24, 826.

The remote, derivative nature of the alleged injuries, in turn, makes more difficult the determination of the amount of damages that is attributable to the alleged wrongdoing, as distinct from other independent factors.

As the circuits have pointed out, considerable speculation would be involved in identifying the costs that have caused the alleged financial instability of the funds and similar costs to the nations' treasuries that the plaintiffs contend have deterred or prevented them from financing various health care programs. *See Wash. Pub. Hosp.*, 241 F.3d at 703; *Allegheny*, 228 F.3d at 441-42; *Laborers Local*, 191 F.3d at 239-40; *Oregon Laborers*, 185 F.3d at 964-65; *Steamfitters*, 171 F.3d at 928-30. For example, it is difficult to know how smokers might have behaved with more complete information, *see Laborers Local*, 191 F.3d at 239-40; *Steamfitters*, 171 F.3d at 929, a problem compounded by the fact that the tobacco companies would be stripped of many defenses that would be available in a subrogation action. *See Teamsters*, 196 F.3d at 823. Reliance on aggregate statistical proof, as the district court in *Service Employees* accepted (without prejudice to later attack by defendants, *see* 83 F.Supp.2d at 88), and as the nations propose, compounds the difficulties and does not alter the speculative nature of the claimed damages. *See Allegheny*, 228 F.3d at 441-42; *Oregon Laborers*, 185 F.3d at 964-65; *Steamfitters*, 171 F.3d at 928-29; *cf. Teamsters*, 196 F.3d at 823. Moreover, the insurers have likely already passed the costs on to the directly injured through higher premiums. *See Teamsters*, 196 F.3d at 824.

Allowing the funds and the nations to proceed would also require complex rules for apportioning damages between potential plaintiffs removed from the alleged wrongdoing by different levels of injury, as well as create a very real possibility of duplicative recoveries against the defendants. The need for complex rules apportioning damages arises because other indirectly injured parties

might also sue. As a result, courts would be required to allocate damages among various classes of directly and indirectly injured parties who are removed from the alleged torts by varying degrees and would be required to do so in a manner that protects the tobacco industry from being held repeatedly liable for the same alleged wrongdoing. *See Holmes*, 503 U.S. at 273, 112 S.Ct. 1311; *AGC*, 459 U.S. at 543-45, 103 S.Ct. 897; *Laborers Local*, 191 F.3d at 240-41; *Oregon Laborers*, 185 F.3d at 965-66; *cf. Teamsters*, 196 F.3d at 823-24. *See generally Ill. Brick*, 431 U.S. at 737-38, 97 S.Ct. 2061.

The nations contend that because they are not private insurers they cannot bring a subrogation action. Further, because they have assumed the responsibility of compensating the directly injured, they suggest that if they cannot recover in this action for the alleged harms, no one can. Assuming the premise to be correct (and the nations' submissions are far from clear on the matter), the argument mistakenly assumes that it was Congress' intent that there must be recoveries, regardless of the burdens inflicted on the legal system and the significant policies captured in the first two *Holmes* factors. *See supra* p. 1073 n. 4. It seems especially implausible that Congress would have wished to saddle the United States judicial system with such burdens simply to accommodate the legal idiosyncrasies of foreign nations. To the extent that such idiosyncrasies stand between the nations' smokers and recoveries in United States courts, the nations may wish to consider amendment of their domestic law.

Relatedly, because individual smokers may seek recoveries for the same alleged conduct under state law theories and because employers, other health insurers,

and other similar potential plaintiffs might also pursue similar antitrust and RICO claims against the tobacco industry, double recovery could occur. *See Wash. Pub. Hosp.*, 241 F.3d at 703; *Teamsters*, 196 F.3d at 823; *Laborers Local*, 191 F.3d at 240-41; *Oregon Laborers*, 185 F.3d at 966; *cf. Allegheny*, 228 F.3d at 442. The district court's contrary view in *Service Employees*, 83 F.Supp.2d at 87-88, fails to take into account the collateral source rule, *see District of Columbia v. Jackson*, 451 A.2d 867, 873 (D.C.1982), and the limits of the single satisfaction rule, *see Lamphier v. Wash. Hosp. Ctr.*, 524 A.2d 729, 734 (D.C.1987), which would not prevent multiple plaintiffs from obtaining duplicative recoveries from a single defendant for a single tort. *See Guatemala*, 83 F.Supp.2d at 131 n. 3; *cf. Laborers Local*, 191 F.3d at 241.

Virtually the same kinds of problems exist with respect to the nations' claims. *See Wash. Pub. Hosp.*, 241 F.3d at 703; *cf. Allegheny*, 228 F.3d at 442; *Pfizer v. Lord*, 522 F.2d at 619-20.

By its very nature, the common law proximate cause requirement adopted by the Supreme Court in *Holmes* and *AGC* leaves open the possibility that "[s]ome injuries caused by an antitrust [or RICO] violation may thus be left unremedied for lack of a proper plaintiff." *Oregon Laborers*, 185 F.3d at 964. *See generally Ill. Brick*, 431 U.S. at 745-47, 97 S.Ct. 2061. The third *Holmes* factor, therefore, must be considered in the context of the proximate cause analysis as a whole rather than as a free-standing, independent ground for finding proximate causation. Were satisfaction of the third *Holmes* factor necessary, the proximate cause analysis would be transformed into a process

for identifying the "best" plaintiff to assert certain antitrust or RICO claims, in contravention of *AGC*, 459 U.S. at 534-35, 103 S.Ct. 897. *Cf. Oregon Laborers*, 185 F.3d at 964. Like other circuits, we conclude that individual smokers constitute a group of potential plaintiffs possessed of more direct claims who can be counted on to deter the alleged wrongdoing by asserting state law theories of recovery or perhaps even RICO and federal antitrust claims to the extent they can prove a measure of damages distinct from personal injuries. *See Wash. Pub. Hosp.*, 241 F.3d at 703; *Teamsters*, 196 F.3d at 823; *Laborers Local*, 191 F.3d at 241; *Oregon Laborers*, 185 F.3d at 964; *Steamfitters*, 171 F.3d at 933; *see also Fed. Trade Comm'n v. Ind. Fed'n of Dentists*, 476 U.S. 447, 461-62, 106 S.Ct. 2009, 90 L.Ed.2d 445 (1986); *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339, 99 S.Ct. 2326, 60 L.Ed.2d 931 (1979).

The funds' and the nations' reliance on the purportedly foreseeable nature of their injuries and the allegedly intentional nature of defendants' wrongdoing is misplaced. "[F]oreseeability and direct injury (or remoteness) are distinct concepts, both of which must generally be established by a plaintiff." *Laborers Local*, 191 F.3d at 236; *see also Steamfitters*, 171 F.3d at 926. Defendants suggest that substitution of the former for the latter would enable circumvention of the settled rule that one who pays the medical expenses of another may not recover those expenses in a direct suit against the tortfeasor but must proceed by way of subrogation. In any event, specific intent to harm the plaintiffs by shifting smoking-related health care costs to them is alone insufficient to overcome the bar on remote claims. *See AGC*, 459 U.S. at 537 & n. 37, 103 S.Ct. 897; *Blue Shield of Va. v. McCready*, 457 U.S. 465,

478-79, 102 S.Ct. 2540, 73 L.Ed.2d 149 (1982); *Laborers Local*, 191 F.3d at 241-42; *Steamfitters*, 171 F.3d at 925.

Accordingly, because the funds' and the nations' claims are "too remote, contingent, derivative, and indirect to survive," *Guatemala*, 83 F.Supp.2d at 130,[6] we reverse the denial of the motion to dismiss the RICO and fraud claims in *Service Employees*, and we otherwise affirm the dismissals of the complaints in *Service Employees* and *Guatemala*.

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[6] The failure of the funds and the nations to demonstrate proximate cause under *Holmes* with respect to their RICO and federal antitrust claims also means that their antitrust and common law claims under District of Columbia law fail for lack of proximate cause. *See McKethean v. Wash. Metro. Area Transit Auth.*, 588 A.2d 708, 716 (D.C.1991); *Lacy v. District of Columbia*, 424 A.2d 317, 321 (D.C.1980); *see also Wash. Pub. Hosp.*, 241 F.3d at 706-07; *Allegheny*, 228 F.3d at 445-46; *Teamsters*, 196 F.3d at 827-28; *Laborers Local*, 191 F.3d at 242-43; *Oregon Laborers*, 185 F.3d at 968-69; *Steamfitters*, 171 F.3d at 934-37.

United States District Court,
District of Columbia.

In re TOBACCO/GOVERNMENTAL HEALTH CARE COSTS LITIGATION.

The Republic of Guatemala, Plaintiff,

v.

The Tobacco Institute, Inc., et al., Defendants

MDL No. 1279.
Misc. No. 99-213.
Civil Action No. 98-1185 (PLF).
Dec. 30, 1999.

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Judah Best, Steve Michaels, Debevoise & Plimpton, Washington, DC, for Council for Tobacco Research-USA, Inc.

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Thomas McCormack, Timothy M. Hughes, Susan Littell, Chadbourne & Parke, New York City, for British-American Tobacco Co., Ltd./Batus Holdings, Inc.

Robert E. Scott, Jr., Paul N. Farquharson, Semmes Bowen & Semmes, Baltimore, MD, for British-American Tobacco Co., Ltd.

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Timothy M. Broas, Michael K. Atkinson, Dan K. Webb, Thomas J. Frederick, Todd Ehlman, Winston & Strawn, Washington, DC, Herbert M. Wachtell, Ben M. Germana, Wachtell, Lipton, Rosen & Katz, New York City, for Philip Morris Companies, Inc. and Philip Morris Inc.

Peter Woolson, Deborah L. Robinson, Hallie A. Moreland, Robinson, Woolson, O'Connell, Baltimore, MD, for Liggett Group, Inc.

OPINION

PAUL L. FRIEDMAN, District Judge.

The Republic of Guatemala has brought suit in this Court against nine individual tobacco companies and the tobacco industry's public relations and research organizations. Guatemala claims that it failed to regulate the use of tobacco products by its citizens adequately because of the tobacco industry's continued misrepresentations and anticompetitive behavior regarding the health impacts of tobacco. It seeks to recover the health care costs it incurred in treating its citizens' smoking-related illnesses. The Court will dismiss all of Guatemala's claims because the alleged injury is too remote and completely derivative

of the injuries suffered by individual Guatemalan smokers.

I. BACKGROUND

The Republic of Guatemala is a sovereign Central American nation with a population of approximately ten million people. Under its constitution, Guatemala must guarantee its citizens the enjoyment of their fundamental rights, including the enjoyment of their health. Guatemala consequently provides a number of free health benefits and services to its citizens, including medical treatment in public clinics and hospitals throughout the country.

Guatemala asserts that it incurred unnecessarily high health-care costs between 1973 and 1997 because it was misled by the defendants about the health risks associated with smoking. It maintains that since the 1950's the defendants have conspired together to conceal and misrepresent the health risks of smoking and the addictive nature of nicotine, to manipulate nicotine levels in cigarettes in order to maintain addiction, to stop using health-related issues to compete with one another, and to suppress the market for less harmful cigarettes. Plaintiff's First Amended Complaint ("Am.Compl.") § 69. As a result of this conspiracy, Guatemala allegedly did not take regulatory action to reduce cigarette smoking by its citizens and to mitigate the harmful effects of the cigarettes its citizens smoked, thereby causing Guatemalan citizens to be stricken with more smoking-related illnesses and causing Guatemala to have to pay a greater amount of associated health care costs. *Id.* §§ 79-84.

Guatemala has sued a group of companies affiliated with Philip Morris (Philip Morris Companies, Philip Morris Incorporated and Philip Morris International); a group of companies affiliated with the British American Tobacco Corporation (BAT Industries, BATCo, BATUS Holdings and Brown & Williamson Tobacco Corporation); two companies affiliated with the Liggett Group (Liggett Group and Brooke Group Limited); the Tobacco Institute and the Council for Tobacco Research-U.S.A. It has not sued Tabacalera Centroamericana, S.A., a subsidiary of Philip Morris, and Tabacalera Nacional, S.A., a subsidiary of the British American Tobacco Corporation, the only two companies that do business directly in Guatemala.

As alleged, Guatemala's injury "is not a form of compensation for personal injuries suffered by those Guatemalan residents who smoke the cigarettes [d]efendants advertise, manufacture, distribute and/or sell in Guatemala. It is a direct injury to Guatemala's property and is separate and wholly distinct from the harms suffered by Guatemalan residents." Am.Compl. § 132. In particular, because the industry's misrepresentations purportedly caused Guatemala to permit more smoking by its citizens than it would have permitted had it known the truth, and because the defendants allegedly suppressed the introduction of less harmful cigarettes, Guatemala claims that it incurred over $300 million in unnecessary health care costs between 1973 and 1997. *Id.* §§ 82, 83. Guatemala brings its claims for relief on six separate theories: (1) common law fraud and intentional misrepresentation, (2) conspiracy to commit fraud and

misrepresentation, (3) violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), (4) violations of both federal and District of Columbia antitrust laws through the suppression of competition in the cigarette and health care markets, (5) negligent misrepresentation, negligence and gross negligence, and (6) negligent performance of a voluntary undertaking.

BAT Industries, BATCo, and BATUS Holdings (the "Rule 12(b)(2) defendants") moved to dismiss the complaint as against them for lack of personal jurisdiction under Rule 12(b)(2) of the Federal Rules of Civil Procedure. All the other defendants except Liggett and Brooke Group Limited (the "Rule 12(b)(6) defendants") moved to dismiss the complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim. At Guatemala's request, the Court allowed limited jurisdictional discovery regarding the Rule 12(b)(2) defendants' arguments respecting personal jurisdiction. Guatemala was permitted to file an amended complaint at the close of discovery, and the parties' motions then were updated for the amended complaint and to take account of the fruits of the jurisdictional discovery.

The Court now has before it defendants' motions to dismiss plaintiff's complaint on a number of grounds. While the Court has considered all of defendants' arguments, it need only address one. Upon consideration of the motions filed, the oppositions and replies, the oral argument of counsel at the March 19, 1999 hearing and the supplemental briefs filed after argument, the Court grants defendants' motion to dismiss all counts of Guatemala's complaint because all of Guatemala's alleged

injuries are too remote to have been proximately caused by defendants' misconduct.[1]

II. DISCUSSION

The Court may dismiss a complaint only if it appears beyond doubt that the plaintiff can prove no set of facts in support of its claim that would entitle it to relief. *See Neitzke v. Williams*, 490 U.S. 319, 327, 109 S.Ct. 1827, 104 L.Ed.2d 338 (1989) (*quoting Hishon v. King & Spalding*, 467 U.S. 69, 73, 104 S.Ct. 2229, 81 L.Ed.2d 59 (1984)); *Kowal v. MCI Communications Corp.*, 16 F.3d 1271, 1276 (D.C.Cir.1994). The complaint must be liberally construed in the plaintiff's favor and the Court must accept any reasonable inferences derived from well-pleaded factual allegations. *See Slaby v. Fairbridge*, 3 F.Supp.2d 22, 27 (D.D.C.1998). The Court need not accept plaintiff's inferences if they are unsupported by facts or its legal conclusions. *Id.*

A. Remoteness

Under the doctrine of remoteness, a plaintiff who complains of harm "flowing merely from the misfortunes visited upon a third person by the defendant's acts [is] generally said to stand at too remote a distance to recover." *Holmes v. Securities Investor Protection Corp.*, 503

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[1] The undersigned notes that Judge Gladys Kessler of this Court recently ruled that similar lawsuits brought by labor union health and welfare trust funds were not too remote to state a claim. *See Service Employees Intern. Union Health & Welfare Fund v. Philip Morris, Inc.*, 83 F.Supp.2d 70 (D.D.C. 1999).

U.S. 258, 268-69, 112 S.Ct. 1311, 117 L.Ed.2d 532 (1992). The doctrine of remoteness is a component of proximate cause, which in turn embraces the concept that "the judicial remedy cannot encompass every conceivable harm that can be traced to alleged wrongdoing." *Associated Gen. Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 536, 103 S.Ct. 897, 74 L.Ed.2d 723 (1983); *see Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris, Inc.*, 171 F.3d 912, 927 (3d Cir.1999) ("Remoteness is an aspect of the proximate cause analysis, in that an injury that is too remote from its causal agent fails to satisfy tort law's proximate cause requirement . . . ").

As one of the most elusive concepts found in the law, proximate cause does not lend itself to precise definition. "[T]he infinite variety of claims that may arise make it virtually impossible to announce a black-letter rule that will dictate the result in every case." *Associated Gen. Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. at 536, 103 S.Ct. 897. The inquiry is "always to be determined on the facts of each case upon mixed considerations of logic, common sense, policy and precedent." *Laborers Local 17 Health and Benefit Fund v. Philip Morris, Inc.*, 191 F.3d 229, 235 (2d Cir.1999) (quoting W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 42 at 279 (5th ed.1984)). To afford some guidance in this uncertain area, the courts have tried to "identify factors that circumscribe and guide the exercise of judgment in deciding whether the law affords

a remedy in specific circumstances." *Associated Gen. Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. at 536, 103 S.Ct. 897.[2]

Defendants argue that even accepting any reasonable inferences that could be derived from the factual allegations in Guatemala's complaint, the doctrine of remoteness bars all of Guatemala's claims. More specifically, defendants argue that Guatemala's alleged injury is so attenuated from defendants' alleged wrongful conduct and so indirect as to require dismissal. To demonstrate, defendants identify five steps in the causal chain linking Guatemala's injury to defendants' alleged conduct: (1) Guatemala's reliance upon defendants' alleged misrepresentations, which led to (2) Guatemala's failure to implement smoking cessation efforts, which led to (3) smoking (or increased smoking) by Guatemala's citizens, which led to (4) Guatemala's citizens having suffered personal injuries and having incurred medical expenses, which led to (5) Guatemala having paid those medical expenses. Because Guatemala would never have been required to pay any medical expenses in the absence of steps three and four – the decisions of its citizens to smoke and the injuries to its citizens that required medical attention –

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[2] The Supreme Court also has imported the general common law requirement of proximate cause and the specific requirement that plaintiff's injury must not be remote and indirect into lawsuits brought under the RICO and antitrust statutes. *See Holmes v. Securities Investor Protection Corp.*, 503 U.S. at 268, 112 S.Ct. 1311; *Associated Gen. Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. at 536, 103 S.Ct. 897.

defendants contend that Guatemala's injuries are inescapably derivative of those of its citizens. In other words, defendants argue that Guatemala is complaining of a "harm flowing merely from the misfortunes visited upon a third person by the defendant's acts" – precisely the type of injury for which the doctrine of remoteness precludes relief. *Holmes v. Securities Investor Protection Corp.*, 503 U.S. at 268, 112 S.Ct. 1311.

Guatemala responds that defendants' analysis too rigidly applies the doctrine of remoteness. It argues that the Court must undertake a subjective analysis to decide whether the alleged conduct and injury are sufficiently related to establish proximate cause. In particular, Guatemala points to the three factors considered by the Supreme Court in *Holmes* in finding that the plaintiff's injury there was too remote: (1) whether the court would find it difficult to determine what damages were caused by defendant's misconduct rather than by independent factors; (2) whether the court would be forced to "adopt complicated rules apportioning damages among plaintiffs removed at different levels of injury . . . to obviate the risk of multiple recoveries"; and (3) whether "the need to grapple with these problems is simply unjustified by the general interest in deterring injurious conduct, since directly injured victims can generally be counted on to vindicate the law as private attorneys general. . . . " *Holmes v. Securities Investor Protection Corp.*, 503 U.S. at 269-70, 112 S.Ct. 1311.

While the application of the doctrine of remoteness is not so clear-cut as defendants suggest and does give courts flexibility in determining in a particular case whether a specific injury is remote from the alleged act of

misconduct, the Court nevertheless concludes that the injury alleged by Guatemala in this case is too remote to find proximate cause under traditional remoteness analysis. Despite Guatemala's claim in its complaint that its injury was "direct," it was not. *See* Am.Compl. § 132. Guatemala's allegation is that defendants' misconduct was aimed directly at it, but it is abundantly clear that the injury that Guatemala purportedly suffered occurred only as a consequence of the harm to individual smokers. Casting the complaint in language that alleges a direct harm to Guatemala does not alter the derivative nature of the injury actually claimed. The fact is that the injury claimed "was no more direct than the indirect injury that arose from the defendants' actions toward smokers." *Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris, Inc.*, 171 F.3d at 927. "[A]ll of plaintiffs' claims rely on alleged injury to smokers – without any injury to smokers, plaintiffs would not have incurred the additional expenses in paying for the medical expenses of those smokers." *Oregon Laborers-Employers Health & Welfare Trust Fund v. Philip Morris Inc.*, 185 F.3d 957, 963 (9th Cir.1999). Any asserted violations of defendants' alleged duty to Guatemala simply "have not been directly linked to [Guatemala's] increased health care expenses given the existence of the essential intervening link of injured individual smokers." *City and County of San Francisco v. Philip Morris, Inc.*, 957 F.Supp. 1130, 1137 (N.D.Cal.1997).

"The tortured path that one must follow from the tobacco companies' alleged wrongdoing to the [plaintiff's] increased expenditures demonstrates that the [plaintiff's] claims are precisely the type of indirect claims that the proximate cause requirement is intended

to weed out." *Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris, Inc.*, 171 F.3d at 930. The Court's own assessment of what is direct and what is remote leads ineluctably to the conclusion that the common law notions of proximate cause and directness of injury cannot support the claims asserted in this case because there is no "direct relation between the injury asserted and the injurious conduct alleged." *Holmes v. Securities Investor Protection Corp.*, 503 U.S. at 268, 112 S.Ct. 1311. Plaintiff's claims are simply too remote, contingent, derivative and indirect to survive.

When one turns to the separate analytical framework Guatemala itself suggests, the result is no different. The application of the three *Holmes* factors also support the Court's conclusion. First, plaintiff's damages, if any, would be speculative and too difficult to ascertain. *See Holmes v. Securities Investor Protection Corp.*, 503 U.S. at 269, 112 S.Ct. 1311 ("[T]he less direct an injury is, the more difficult it becomes to ascertain the amount of a plaintiff's damages attributable to the violation, as distinct from other, independent, factors"). As an initial matter, the Court would be required to evaluate the efforts the Guatemalan government likely would have taken to control tobacco usage if the tobacco industry had not communicated allegedly fraudulent and misleading information. Few inquiries are more speculative than this. In other contexts, courts traditionally have been reluctant to deconstruct the reasons for governmental decision-making because of the great number of subjective influences at play. *See City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 377, 111 S.Ct. 1344, 113 L.Ed.2d 382 (1991) ("This would require the sort of deconstruction

of the governmental process and probing of the official 'intent' that we have consistently sought to avoid"); *Rosado v. Wyman*, 397 U.S. 397, 419, 90 S.Ct. 1207, 25 L.Ed.2d 442 (1970) ("speculation as to the legislative and executive motive is to be shunned").

The Court also would be required to speculate about the potential impact that any smoking cessation efforts of the Guatemalan government would have had on the behavior of individual smokers, as well as the extent to which the health care costs of Guatemalan citizens are attributable to smoking as opposed to other etiologies. As the Second Circuit noted in dismissing a similar claim brought by union health and welfare funds:

> It will be virtually impossible for plaintiffs to prove with any certainty: (1) the effect any smoking cessation programs or incentives would have on the number of smokers among the plan beneficiaries; (2) the countereffect that the tobacco companies' direct fraud would have had on the smokers, despite the best efforts of the Funds; and (3) other reasons why individual smokers would continue smoking, even after having been informed of the dangers of smoking and having been offered smoking cessation programs. On a fundamental level, these difficulties of proving damages stem from the agency of the individual smokers in deciding whether, and how frequently, to smoke. In this light, the direct injury test can be seen as wisely limiting standing to sue in those situations where the chain of causation leading to damages is not complicated by the intervening agency of third parties (here, the smokers) from whom the plaintiffs' injuries derive.

Laborers Local 17 Health & Benefit Fund v. Philip Morris, Inc., 191 F.3d at 239-40; *see also Oregon Laborers-Employers Health & Welfare Trust Fund v. Philip Morris Inc.*, 185 F.3d at 965 (quoting *Laborers Local 17 Health & Benefit Fund v. Philip Morris, Inc.*); *Seafarers Welfare Plan v. Philip Morris*, 27 F.Supp.2d 623, 632 (D.Md.1998) ("[I]t would be extremely difficult, if not impossible, to determine whether, and the extent to which, any of the Funds' participants had other health problems which may have exacerbated the costs of health care for that smoker").

In addition, the Court would be required to speculate as to how much more money Guatemala spent to treat its citizens' smoking-related illnesses than it would have spent to treat whatever other health problems eventually might plague those same citizens. As Judge Easterbrook recently observed:

> To determine damages, . . . it is essential to compare the costs the insurers actually incurred against the costs they would have incurred had cigarettes been safer. Is death from lung cancer at age 60 more costly to an insurer than the same person's death from a different kind of cancer later in life?

International Brotherhood of Teamsters v. Philip Morris Inc., 196 F.3d 818, 823 (7th Cir.1999). The aggregation of these layers of conjecture would result in little certainty regarding an assessment of damages or a determination of what damages are attributable to defendants' alleged violations of law as distinct from other independent factors.

Second, because the tobacco industry's misconduct allegedly injured individual smokers as well as the Guatemalan government (and perhaps caused injuries to other Guatemalan payors for health care as well), the Court would be required to adopt "complicated rules apportioning damages among plaintiffs removed at different levels of injury . . . to obviate the risk of multiple recoveries." *Holmes v. Securities Investor Protection Corp.*, 503 U.S. at 269, 112 S.Ct. 1311. In many United States jurisdictions, including this one, the collateral source rule would allow individual smokers to recover their own medical expenses irrespective of Guatemala's having already paid their medical bills or costs. *See, e.g., District of Columbia v. Jackson*, 451 A.2d 867, 871 & n. 4 (D.C.1982) (a victim may retain both a judgment against a tortfeasor and a benefit from a collateral source "even if the benefit is completely gratuitous"). Although Guatemala may be pursuing the recoupment of these medical expenses under different legal theories than would individual smokers, it still seeks damages for identical injuries and the Court would need to address the potential inequity of this situation.[3]

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[3] In *Service Employees Intern. Union Health & Welfare Fund v. Philip Morris, Inc.*, Judge Kessler stated that the "single satisfaction rule" would eliminate the possibility of multiple recoveries because that rule would "allow [d]efendants to get credit for damages paid to [the union health and welfare funds] should there be any subsequent lawsuits awarding damages to Fund participants, employers, or health insurers, to the extent those damages overlapped." 83 F.Supp.2d 70 (D.D.C. 1999). The "single satisfaction rule," however, would not mandate the suggested result; it only forbids a *single* plaintiff from recovering "doubly, in whole or in part, for the same injury."

Third, actions by remote plaintiffs are unjustified when other potential plaintiffs exist who could "be counted on to vindicate the law as private attorneys general. . . . " *Holmes v. Securities Investor Protection Corp.*, 503 U.S. at 269, 112 S.Ct. 1311. With the myriad of direct claims that have been brought against the tobacco industry in the last few years, it cannot seriously be asserted that there is any lack of such "private attorneys general." *See, e.g.*, Saundra Torry, *Cigarette Firms Lose Huge Suit; Jury Finds 'Outrageous Conduct,'* WASH. POST, July 8, 1999 at A1. The individual Guatemalan smokers are entirely capable of bringing their own lawsuits to recover their medical expenses and damages for other causally connected injuries such as pain and suffering. *See Oregon Laborers-Employers Health & Welfare Trust Fund v. Philip Morris Inc.*, 185 F.3d at 964 ("[T]here is an identifiable group of persons – smokers – whose self-interest will motivate them to seek recovery of the damages caused by defendants' alleged wrongful conduct"). Guatemala also might bring a subrogation action to recover the medical costs it has paid out for the individual smokers. Furthermore, the fact that such actions by individual Guatemalan citizens or in subrogation by Guatemala itself would more logically be pursued in the courts of Guatemala rather than here is all to the good. The injury occurred

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Lamphier v. Washington Hosp. Ctr., 524 A.2d 729, 734 (D.C.1987). *See Laborers Local 17 Health & Benefit Fund v. Philip Morris, Inc.*, 191 F.3d at 239-40 ("The single satisfaction rule is often used to prevent a single plaintiff from recovering its damages several times over from multiple defendants"). In this case, there potentially are multiple plaintiffs seeking compensation for the same injury.

there, two potential defendants not sued in this action (Tabacalera Centroamericana, S.A. and Tabacalera Nacional, S.A.) reside and do business there, and the courts of Guatemala are at least as well-positioned to vindicate the rights of its citizens as is this Court.[4]

Guatemala argues in the alternative that even if its injury is too remote to support some of its claims, most claims should survive because it has alleged intentional instead of negligent misconduct by the defendants. But many of the seminal cases barring remote claims, including *Holmes* itself, involved allegedly intentional conduct. *See, e.g., Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 112 S.Ct. 1311, 117 L.Ed.2d 532 (securities fraud); *Associated Gen. Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 103 S.Ct. 897, 74 L.Ed.2d 723 (antitrust conspiracy); *Mobile Life Ins. Co. v. Brame*, 95 U.S. 754, 24 L.Ed. 580 (1877) (murder); *Anthony v. Slaid*, 52 Mass. (11 Metcalf) 290 (1846) (assault). In fact, the Supreme Court has specifically stated that under the doctrine of remoteness the availability of a remedy "is not a question of the specific intent of the conspirators." *Associated Gen. Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. at 537 & n. 37, 103 S.Ct. 897 (quoting *Blue Shield v. McCready*, 457 U.S. 465, 479, 102 S.Ct. 2540, 73 L.Ed.2d 149 (1982)). "[A]n allegation of specific intent does not overcome the

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[4] That individual smoker and subrogation actions would be subject to affirmative defenses not available to the tobacco industry in this case is irrelevant. Affirmative defenses exist in the law for sound policy reasons, and the success of the tobacco industry's assertion of them must be judged by whether it would effectuate the policies.

requirement that there must be a direct injury to maintain this action." *Laborers Local 17 Health and Benefit Fund v. Philip Morris, Inc.*, 191 F.3d at 242; *see also Pillsbury, Madison & Sutro v. Lerner*, 31 F.3d 924, 929 (9th Cir.1994).

Finally, as several courts have recognized in similar instances, a "failure to apply the remoteness doctrine [in a case like this] would permit unlimited suits to be filed." *Iowa v. Philip Morris, Inc.*, 577 N.W.2d 401, 407 (Iowa 1998); *see also Oregon Laborers-Employers Health & Welfare Trust Fund v. Philip Morris*, 17 F.Supp.2d 1170, 1179 (D.Or.1998) (dismissal was appropriate to avoid opening the door to the "indirect, massive and complex damage litigation that the Supreme Court sought to preclude in *Holmes*"), *aff'd* 185 F.3d 957 (9th Cir.1999); *cf. Dundee Cement Co. v. Chemical Laboratories, Inc.*, 712 F.2d 1166, 1171 (7th Cir.1983). This concern applies with particular weight in this instance, where dozens of foreign governments, as well as other foreign health care payors, might attempt to bring similar suits in United States courts. Both the analytical framework mandated by the Supreme Court in *Holmes* and the relevant policy considerations therefore support the conclusion that Guatemala's alleged injury is too remote to permit suit.[5]

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[5] The majority of state and federal courts, including all four federal courts of appeals that have reached the issue, also have held that claims by third-party payors for tobacco-related health care expenses are too remote and indirect to allow recovery. *See, e.g., Int'l Brotherhood of Teamsters v. Philip Morris Inc.*, 196 F.3d 818 (7th Cir.1999); *Laborers Local 17 Health and Benefit Fund v. Philip Morris, Inc.*, 191 F.3d 229 (2d Cir.1999); *Oregon Laborers-Employers Health & Welfare Trust Fund v. Philip Morris Inc.*, 185 F.3d 957 (9th Cir.1999); *Steamfitters Local Union No. 420 Welfare*

B. Parens Patriae

Guatemala's status as a sovereign government gets it no further. While it is established that a state government has standing to sue in a *parens patriae* action to protect its quasi-sovereign interests, it may do so only in limited circumstances. First and foremost, it "must articulate an interest apart from the interests of particular private parties," that is to say, "the State must be more than a nominal party." *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 600, 607, 102 S.Ct. 3260, 73 L.Ed.2d 995 (1982). Second, it must sue to vindicate a "quasi-sovereign" interest, which may be either (1) an interest in "the health and well-being – both physical and economic – of its residents in general," or (2) an interest "in not being

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Fund v. Philip Morris, Inc., 171 F.3d 912 (3d Cir.1999); *Northwest Laborers-Employers Health & Security Trust Fund v. Philip Morris, Inc.*, 58 F.Supp.2d 1211 (W.D.Wash.1999); *Hawaii Health & Welfare Trust Fund for Operating Engineers v. Philip Morris, Inc.*, 52 F.Supp.2d 1196 (D.Haw.1999); *Laborers' and Operating Engineers' Utility Agreement Health & Welfare Trust Fund for Arizona v. Philip Morris, Inc.*, 42 F.Supp.2d 943 (D.Ariz.1999); *Regence Blueshield v. Philip Morris, Inc.*, 40 F.Supp.2d 1179 (W.D.Wash.1999); *Seafarers Welfare Plan v. Philip Morris*, 27 F.Supp.2d 623 (D.Md.1998); *City and County of San Francisco v. Philip Morris, Inc.*, 957 F.Supp. 1130 (N.D.Cal.1997); *Southeast Florida Laborers District Health and Welfare Trust Fund v. Philip Morris*, 1998 WL 186878 (S.D.Fla. Apr.13, 1998); *Iowa v. Philip Morris, Inc.*, 577 N.W.2d 401 (Iowa 1998); *Minnesota v. Philip Morris, Inc.*, 551 N.W.2d 490 (Minn.1996); *Washington v. American Tobacco Co.*, 1997 WL 714842 (1997); *Maryland v. Philip Morris, Inc.*, 1997 WL 540913 (Md.Cir.Ct. May 21, 1997). *But see Service Employees Intern. Union Health & Welfare Fund v. Philip Morris, Inc.*, 83 F.Supp.2d 70 (D.D.C. 1999); *Blue Cross & Blue Shield of New Jersey, Inc. v. Philip Morris, Inc.*, 36 F.Supp.2d 560 (E.D.N.Y.1999); *State of Texas v. American Tobacco Co.*, 14 F.Supp.2d 956 (E.D.Tex.1997).

discriminatorily denied its rightful status within the federal system." *Id.* at 607, 102 S.Ct. 3260. Finally, its "quasi-sovereign interest must be sufficiently concrete to create an actual controversy between the State and the defendant." *Id.* at 602, 102 S.Ct. 3260.

While there is some dispute as to whether a foreign sovereign may bring suit in a United States court at all under a *parens patriae* theory,[6] clearly if it can the second category of interests – not being discriminated against within the federal system – is irrelevant in the case of a foreign sovereign. With respect to the first category of interests – the physical and economic well-being of its citizens – injury to the foreign sovereign is cognizable (1) when "the direct impact of the wrong [would] be felt by a substantial majority, though less than all, of the state's citizens, so that the suit can be said to be for the benefit of the public," or (2) when there is "substantial generalized economic effects" although "the most direct injury is to a fairly narrow class of persons." *Commonwealth of Pennsylvania v. Kleppe*, 533 F.2d 668, 670 (D.C.Cir.1976). As the Court has no reason to conclude that the direct impacts of smoking have been felt by the "substantial majority" of Guatemala's citizens, the only quasi-sovereign interest that Guatemala might assert in this case is its interest in

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[6] *Compare Coordination Council for N. Am. Affairs v. Northwest Airlines, Inc.*, 891 F.Supp. 4, 7 n. 3 (D.D.C.1995) ("Foreign sovereigns are equally entitled to protect their citizens and may claim *parens patriae* standing to the same extent as a state") *with Estados Unidos Mexicanos v. DeCoster*, 59 F.Supp.2d 120 (D.Me.1999) (Mexico does not have standing under the *parens patriae* doctrine to protect its quasi-sovereign interests). *Cf. Pfizer, Inc. v. Lord*, 522 F.2d 612, 616 (8th Cir.1975).

recovering for "substantial generalized economic effects." Guatemala, however, has explicitly stated that the damages it is seeking are "to its own business or property (its treasury) and not to the general economy." Guatemala's May 7, 1999 Limited Reply at 10; *see* Am.Compl. §§ 29, 78, 131, 145, 172, 185. Such damages implicate Guatemala's proprietary interests, not its quasi-sovereign interests, and Guatemala therefore cannot bring a *parens patriae* action to vindicate these interests.

Even if the Court were to find that Guatemala had asserted some cognizable quasi-sovereign interest, the fact that there are individual Guatemalan smokers capable of bringing suit to redress these injuries in the courts of Guatemala would prevent Guatemala from bringing suit as *parens patriae*. *Parens patriae* standing is rarely appropriate in "the presence of a more appropriate party or parties capable of bringing suit," *Pennsylvania v. Kleppe*, 533 F.2d at 675, and such suits "cannot be brought to collect the damages claim of one legally entitled to sue in his own right." *Pfizer, Inc. v. Lord*, 522 F.2d at 616. "*Parens patriae* standing appears to be most justifiable in those instances where undeniable harm has been done, but for some reason the individual injuries are not legally cognizable." *Pennsylvania v. Kleppe*, 533 F.2d at 675 n. 42. After all, the theoretical underpinning of *parens patriae* standing is to "prevent[ ] . . . injury to those who cannot protect themselves." *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. at 600, 102 S.Ct. 3260 (quoting *Late Corp. of Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1, 57, 10 S.Ct. 792, 34 L.Ed. 478 (1890)). As previously noted, however, the individual Guatemalan smokers are entirely capable of protecting themselves. *See*

supra at 12-13, 10 S.Ct. 792. There is no need to allow Guatemala to bring suit to protect their interests.

* * *

Finally, if the Court were to reach defendants' other arguments, it would dismiss on many of those grounds as well. For example, Guatemala has failed sufficiently to allege antitrust injury.[7] A plaintiff in an antitrust suit may only bring suit if it has suffered an "antitrust injury," which the Supreme Court has defined as "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 334, 110 S.Ct. 1884, 109 L.Ed.2d 333 (1990). As this Court said in *Dial A Car Inc. v. Transportation, Inc.*:

> The injury claimed must "reflect the anticompetitive effect, either of the violation or of anticompetitive acts that [were] made possible by the violation." . . . The antitrust laws were not intended to prevent losses that result from increased competition but those resulting from activity that may tend to lessen competition. . . . The reason an antitrust plaintiff is required to plead antitrust injury is to assure that a plaintiff

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[7] Because the District of Columbia antitrust statute is also governed by the same principles, the Court would dismiss all of Guatemala's antitrust claims on these grounds. *See Mazanderan v. Independent Taxi Owners' Ass'n*, 700 F.Supp. 588, 591 n. 9 (D.D.C.1988) (in construing the District of Columbia Antitrust Act, "a court of competent jurisdiction may use as a guide interpretations given by federal courts to comparable antitrust statutes").

> can recover "only if the loss stems from a competition-*reducing* aspect or effect of the defendant's behavior."

884 F.Supp. 584, 589 (D.D.C.1995) (citations omitted), *aff'd*, 82 F.3d 484 (D.C.Cir.1996). Guatemala's complaint alleges no "competition-reducing aspect or effect" in the cigarette market. *See International Brotherhood of Teamsters v. Philip Morris Inc.*, 196 F.3d 818, 825; *Oregon Laborers-Employers Health & Welfare Trust Fund v. Philip Morris Inc.*, 185 F.3d at 966-67; *State of Texas v. American Tobacco Co.*, 14 F.Supp.2d 956, 969-70 (E.D.Tex.1997); *Laborers Local 17 Health & Benefit Fund v. Philip Morris, Inc.*, 7 F.Supp.2d 277, 290 n. 9 (S.D.N.Y.1998), *aff'd* 191 F.3d 229 (2d. Cir.1999).[8]

III. CONCLUSION

If it has been injured, the Republic of Guatemala, like any other litigant, may bring suit in this Court to vindicate its interests. The same principles of American jurisprudence that would be applied in testing any other litigant's claims, however, must be applied in evaluating the claims asserted by Guatemala. Guatemala or its citizens may well have been victims of the tobacco industry, but Guatemala has alleged no injury resulting from defendants' alleged misconduct that is sufficiently direct

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[8] Furthermore, if the Court had reached the additional issues raised by defendants, at least three defendants would be dismissed for lack of personal jurisdiction, and the fraud-based claims, including Guatemala's RICO claim, would be dismissed, albeit without prejudice, for failure to plead with particularity under Rule 9(b) of the Federal Rules of Civil Procedure.

to allow Guatemala to assert its claims. Guatemala's complaint therefore must be dismissed.

An Order consistent with this Opinion is entered this same day.

SO ORDERED.

ORDER AND JUDGMENT

Upon consideration of defendants' motions to dismiss, the oppositions and replies, the oral argument of counsel at the March 19, 1999 hearing and the supplemental briefs filed after argument, it is hereby

ORDERED that defendants' motion to dismiss for failure to state a claim is GRANTED; it is

FURTHER ORDERED that defendants' motions to dismiss for lack of personal jurisdiction are DENIED without prejudice as moot; it is

FURTHER ORDERED that JUDGMENT is entered for defendants; it is

FURTHER ORDERED that this Order shall constitute a FINAL JUDGMENT in this case; and it is

FURTHER ORDERED that this case is dismissed with prejudice from the docket of this Court.

SO ORDERED.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

In re TOBACCO/ GOVERNMENTAL HEALTH CARE COSTS LITIGATION	MDL Docket No. 1279 Misc. No. 99-213 Civil Action No. 99-1535 Civil Action No. 99-3080

MEMORANDUM OPINION

(Filed Mar. 31, 2000)

Plaintiffs the Republic of Nicaragua and Ukraine both have sued the tobacco industry on the grounds that they were injured because the tobacco industry's continued misrepresentations and anticompetitive behavior regarding the health impacts of tobacco caused them to fail to regulate adequately the use of tobacco products by their citizens. On December 30, 1999, the Court dismissed a similar lawsuit brought by the Republic of Guatemala because Guatemala's injury as alleged was not proximately caused by the tobacco industry's misconduct. *The Republic of Guatemala v. The Tobacco Institute,* 83 F.Supp.2d 125 (D.D.C. 1999). In particular, the Court held that Guatemala's injury was too remote and completely derivative of the injuries suffered by individual Guatemalan smokers. *Id.* Given the apparent similarity between the lawsuit brought by Guatemala and the lawsuits brought by plaintiffs in these cases, the Court ordered plaintiffs the Republic of Nicaragua and Ukraine to show cause in writing on or before March 3, 2000 why the Court should not dismiss these cases with prejudice for the reasons set forth in its Opinion in *The Republic of Guatemala v. The*

Tobacco Institute. Plaintiffs have now responded, and the Court allowed defendants to file a reply to the submissions of plaintiffs.

In response to the Court's Order to Show Cause, Nicaragua did not attempt to distinguish its case from the lawsuit brought by the Republic of Guatemala; indeed, Nicaragua appears to concede that the two lawsuits are nearly identical. Nicaragua instead adopted the arguments that had been made by the Republic of Guatemala in its opposition to defendants' motion to dismiss. The Court therefore concludes that there is no reason that the lawsuit brought by Nicaragua should not be dismissed for the reasons set forth in its earlier Opinion regarding the Republic of Guatemala.

The response of Ukraine also focused on the arguments that had been made and rejected in the Guatemala lawsuit. Ukraine primarily points the undersigned to the contrary ruling of Judge Gladys Kessler of this Court in *Service Employees Int'l Union Health & Welfare Fund v. Philip Morris, Inc.*, 83 F.Supp.2d 70 (D.D.C. 1999). To the extent that Judge Kessler's decision is relevant and diverges from the undersigned's decision in the lawsuit brought by Guatemala, the conflict is for the court of appeals to resolve. This Court will not reconsider its earlier ruling on those grounds. Finally, Ukraine attempts to distinguish its case on the grounds that it alleges it had a constitutional obligation to provide for its citizens' health care, that it alleges defendants controlled and expanded the Ukrainian cigarette market, that its entire population was harmed by the increasing diversion of funds to care for smokers, and that its lawsuit is based on the conduct of defendants rather than its reliance on their

misrepresentations. To the extent that Ukraine's lawsuit may be distinguished from Guatemala's lawsuit on any of these grounds, none of the distinctions make Ikraine's alleged injury any less remote or, as a result, any more viable. The court therefore will dismiss Ukraine's lawsuit for the reasons set forth in its December 30, 1999 Opinion in *The Republic of Guatemala v. The Tobacco Institute.*

An Order and Judgment consistent with this Memorandum Opinion is entered this same day.

SO ORDERED.

/s/ Paul L. Friedman
PAUL L. FRIEDMAN
United States District Judge

DATE: 3/31/00

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

In re TOBACCO/ GOVERNMENTAL HEALTH CARE COSTS LITIGATION	MDL Docket No. 1279 Misc. No. 99-213 Civil Action No. 99-1535 Civil Action No. 99-3080

ORDER AND FINAL JUDGMENT

(Filed March 31, 2000)

Upon consideration of the Republic of Nicaragua's Response to Order to Show Cause, Ukraine's Response to the Court's Order to Show Cause and defendants' reply, and for the reasons set forth in the Memorandum Opinion entered this same day, it is hereby

ORDERED that Civil Action No. 99-1535 is DISMISSED with prejudice from the docket of this Court; it is

FURTHER ORDERED that Civil Action No. 99-3080 is DISMISSED with prejudice from the docket of this court; it is

FURTHER ORDERED that JUDGMENT is entered for defendants in Civil Action No. 99-1535 and Civil Action No. 99-3080; it is

FURTHER ORDERED that this Order shall constitute a FINAL JUDGMENT in these cases. This is a final appealable Order. *See* Rule 4(a), Fed. R. App. P.

SO ORDERED.

/s/ Paul L. Friedman
PAUL L. FRIEDMAN
United States District Judge

DATE: 3/31/00